SUPREME COURT, U. S.

FEB 28

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IN THE

Supreme Court of the United States

No. 73-1329

October Term, 1973

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

VENOLIOUS LEE WOODS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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Attorney for Petitioner.

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IN THE

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No. .....

October Term, 1973

COMMONWEALTH OF PENNSYLVANIA,
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v.

VENOLIOUS LEE WOODS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, The Chief Justice and The Associate Justices of The Supreme Court of The United States:

Petitioner, the Commonwealth of Pennsylvania, by its Attorneys, ROBERT W. DUGGAN, District Attorney of Allegheny County, Pennsylvania, and ROBERT L. CAMPBELL, Assistant District Attorney, respectfully prays that a writ of certiorari issue to review the opinion of the Supreme Court of Pennsylvania entered in this proceeding on December 4, 1973, relating to the Respondent, Venolious Lee Woods.

Pursuant to rule 23 of this Honorable Court, your Petitioner respectfully represents as follows:

Opinions Below

Commonwealth v. Woods

The opinion of the Court of Common Pleas of Allegheny County appears in Appendix A hereto.

The opinion of the Supreme Court of Pennsylvania is reported at: *Commonwealth v. Woods*, 453 Pa. 798, A.2d (1973) and appears in Appendix B hereto.

Statement of Jurisdiction

1. The opinion of the Supreme Court of Pennsylvania was entered on December 4, 1973, and this petition for certiorari was filed within ninety (90) days of that date.

2. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1257 (3).

Question Stated for Review

Whether the Supreme Court of Pennsylvania has misconstrued the United States Constitution and refused to recognize relevant decisions of your Honorable Court in holding that *Harris v. New York*, 401 U.S. 222 (1971), restricts the state prosecutor's use of a prior held inadmissible statement in rebuttal to situations of perjured testimony as opposed to issues of motive and general credibility?

Constitutional Provisions Involved

The Fourteenth Amendment to the Constitution of the United States in pertinent part provides:

> ". . .nor shall any State deprive any person of life, liberty, or property, without due process of law."

Statement of the Case

Commonwealth v. Woods

Respondent was arrested and charged with Murder, Voluntary Manslaughter, and Involuntary Manslaughter. Prior to trial, Respondent filed a Motion to Suppress certain oral statements given by him which was later heard by the Court and the Motion to Suppress granted. Respondent entered a plea of not guilty to the charges and a jury trial commenced on June 15, 1971. On June 18, 1971, Respondent was found guilty of Second Degree Murder and sentenced to serve a term of imprisonment of not less than eight or more than sixteen years.

Subsequently, Respondent filed a Motion for New Trial and In Arrest of Judgment alleging that: (1) the Court erred in permitting testimony for the Commonwealth in rebuttal relating to an oral admission previously suppressed after a hearing before the court on June 15, 1971; (2) the above testimony was not admissible under the case of *Harris v. New York, supra;* and other allegations not pertinent to the questions herein involved. These motions for a new trial and in arrest of judgment were later denied after argument before a court *en banc.*

Following the denial of his post-trial motions, Respondent appealed to the Supreme Court of Pennsylvania alleging the sole issue of whether or not your Honorable Court's decision in *Harris v. New York, supra,* supported the lower court's ruling in light of the circumstances involved. On December 4, 1973, after argument before the Supreme Court of Pennsylvania, the Court entered an Order reversing the lower court and ordering a new trial on the basis that *Harris v. New York, supra,* was not applicable to the factual circumstances of the present case in that *Harris* was intended to apply only to cases where perjured testimony was involved and not to situations involving matters of motive and general credibility.

ARGUMENT

Reason for Allowance of Writ

I. The Pennsylvania Supreme Court has misconstrued the United States Constitution and refused to recognize relevant decisions of your Honorable Court in holding that *Harris v. New York*, 401 U.S. 222 (1971) restricts the State prosecutor's use of a prior held inadmissible statement in rebuttal only to prejured testimony, as opposed to issues of motive and general credibility.

In *Commonwealth v. Woods*, 453 Pa. 798, A.2d (1973), the Pennsylvania Supreme Court ruled that the state prosecutor's use of a prior held inadmissible statement to rebut the defendant's testimony as to motive and general credibility was violative of the defendant's Fourteenth Amendment right to due process. It is the Commonwealth's contention that this holding is incorrect. Since the defendant testified in his own behalf, the use of a pre-trial statement which clearly conflicted with his trial testimony was admissible for impeachment purposes under the rule of *Harris v. New York, supra.*

The Pennsylvania Supreme Court, in refusing to apply *Harris, supra*, stated that it has received much unfavorable comment, and that it has been rejected or limited in other jurisdictions. The Commonwealth sees no merit in this contention. No federal or state court has yet denied the authority of your Honorable Court to interpret the applicability of the United States Constitution to the defendant's right to due process. In *State v. Santiago*, 53 Haw. 254, 492 P.2d 657 (1971), the Supreme Court of Hawaii refused to apply the *Harris* rule because its own state constitution required that suppressed statements be held inadmissible for any purpose. In *People v. Taylor*, 104 Cal.

Rptr. 350, 501 P.2d 918 (1972), the California Supreme Court neither limited nor rejected *Harris, supra,* but simply concluded that *Agnello v. United States,* 269 U.S. 20 (1925), and *Walder v. United States,* 347 U.S. 62 (1954), were more applicable to the narcotics case then before the court. The Pennsylvania Supreme Court's discontent with the *Harris* rule is not reflected in the decisions of other federal and state courts.

The court in *Woods, supra,* further stated that because the defendant agreed at trial with the position taken by the Commonwealth, his prior voluntary and inconsistent statements were inadmissible. The Commonwealth contends that this interpretation is unreasonably narrow and puts greater limits on the *Harris* rule than those intended by your Honorable Court.

In *Riddell v. B. J. Rhay,* 79 Wash. 2d 248, 484 P.2d 907, cert. denied 404 U.S. 974 (1971), both the prosecution and defense agreed at trial as to all the facts of an assault, yet the defendant's prior inconsistent statements were allowed to rebut both the defendant's general credibility and his motive. Again in *Bryant v. North Carolina,* 280 N.C. 551, 187 S.E.2d 111, cert. denied 409 U.S. 995 (1972), there was no disagreement as to the facts of the crime, yet prior inconsistent statements were allowed to question the defendant's motive and general credibility. This decision was found controlling in a subsequent North Carolina case, *State v. Nobles,* 14 N.C. App. 341 (1972).

In deciding that the procedure followed in *Harris, supra,* was not constitutionally infirm, your Honorable Court had to determine whether *Miranda v. Arizona,* 384 U.S. 436 (1966) required that a statement obtained contrary to its dictates could be used for impeachment purposes. The Court, speaking through Mr. Chief Justice Burger, stated:

> It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards. 401 U.S. at 224.

The Court further stated that:

> *The impeachment process here undoubtedly provided valuable aid to the jury in assessing Petitioner's credibility, and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby.* **Assuming that the exclusionary rule has a** deterrent effect on police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief. 401 U.S. at 225 (emphasis added).

That the prior inconsistent statements of a defendant did not conflict with specific false statements made on direct examination has not deterred other courts from applying the *Harris* doctrine. In *U. S. v. Penta*, 475 F.2d 92 (1973), the First Circuit Court of Appeals stated that:

> Concededly, the otherwise inadmissible but trustworthy confessions and physical evidence in *Harris* and *Walder* were used to directly contradict specific false statements made on direct examination, and not to attack the defendant's credibility in a more general matter. Yet it appears that the controlling rationale was that the valuable aid to assessing the defendant's credibility that impermissible police conduct will be encouraged thereby. 475 F.2d at 95.

In the present case, the Commonwealth made no attempt to use the defendant's prior inconsistent statements in their case in chief. The deterrent effect on police conduct, required by the *Miranda* decision, was achieved. Only when the defendant took the witness stand to claim his innocence of the crime charged, were his prior inconsistent actions admitted to reflect on his motive and credibility.

United States ex rel. Burt v. New Jersey, 475 F.2d 234 (1973).

The Commonwealth contends that the defendant's false statements to police officers, made in an attempt to conceal the facts of a killing he had just committed, although barred from the prosecution's case in chief, were not inadmissible for all purposes. It was never the intention of your Honorable Court in *Harris, supra*, to bar prior voluntary and inconsistent statements which both assist the jury in assessing the defendant's credibility, and show that his motive was other than the one claimed by him at trial.

Conclusion

The Commonwealth asserts that the failure of the Pennsylvania Supreme Court to recognize the controlling decisions of your Honorable Court in the instant situation was constitutionally infirm. For the reasons stated above, it is urged that the petition be granted or, in the alternative, that the Pennsylvania Supreme Court be summarily reversed.

Respectfully submitted,

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APPENDIX 'A"

Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

IN THE

COURT OF COMMON PLEAS

OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

vs.

VENOLIOUS LEE WOODS.

No. 6642 September Sessions, 1970
(Murder)

OPINION.

Before: Fiok and Doyle, JJ.

FIOK, J.

On June 18, 1971, defendant, Venolious Woods, was convicted by a jury of murder in the second degree and on the same day he was sentenced to a term of not less than eight years nor more than sixteen years in the Western Correctional Diagnostic & Classification Center. This sentence was stayed pending disposition of his motions in arrest of judgment and for a new trial.

A brief summary of the facts and events leading up to the killing as established by the evidence is as follows:

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

Late in the evening of May 8, 1970, Holland Lingard, met his death during a chase by the defendant on Fleury Way in the Homewood section of the City of Pittsburgh as a result of three knife wounds, two of which penetrated his left lung and his heart. Dr. Joseph C. Sieracki, pathologist for the Coroner's Office of Allegheny County, testified as to the location of these wounds and concluded that the ultimate cause of death was the wound piercing the heart and loss of blood resulting therefrom.

The Commonwealth's case was predicated on the felony murder theory. Evidence was introduced to show that the victim, pursuant to a telephone call from an Antoinette Davenport, went to her home at 1119 North Lang Avenue to help her move certain of her belongings to another house. When the victim left his mother's house, he had on his person the sum of Forty ($40.00) Dollars placed in his wallet. This money was missing when the wallet was recovered. Defendant also lived in this two-room apartment of Miss Davenport, occupying the rear room with Luella Patterson. The front and rear rooms were connected.

The police arrived at the scene shortly after the incident and they found a trail of blood which lead west up Fleury Way to where the victim was found lying in the middle of the street. From information received, they then proceeded to the home of the defendant where they questioned him as a part of routine police investigation. Defendant informed them that he knew nothing about the incident. They then went to the front room of the Davenport apartment where they found a green gaucho shirt belonging to the victim on the bench near the front window. When defendant was asked about this shirt, he informed the police that he found it hanging on a door knob.

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

The police also interrogated two witnesses who were sitting outside on the steps at 7025 Fleury Way. Roxanne Salih testified that she was with Clayton Mariner when a black man wearing only a pair of trousers was seen running up the street and when he got to her house, he began to walk and walked past her. Just then a car drove up and she saw a black male jump out of the car. The first man then doubled around the car and began running and the second man ran after him. They disappeared out of her sight but a short time later she saw the man without the shirt (the victim) return into her view, take a couple of steps and then fall. Clayton Mariner, who was visiting Roxanne Salih, testified that he saw the first man without a shirt running up the alley; that he saw a white Mustang drive up behind this man and another black man got out of the car and began chasing the man without a shirt and both ran up the alley out of his view. The man chasing the shirtless man had on a white shirt and a brown or beige pair of trousers. Later on the shirtless man returned toward him and then fell.

John Williams of 7036 Fleury Way testified that he was in bed on the night in question when he heard a racket out in front of his house. He heard some cursing going on and when he stepped to the window he saw two black men getting into a car and drive away. By the time he got dressed and went outside, the police had arrived. He recognized the person lying out in the street as the victim.

Antoinette Davenport testified that the defendant lived with her and Dixie Lee Davis at the North Lang Avenue apartment from about the end of April to May 8th. On May 8th she moved from her apartment at North Lang

Avenue to Kedron Street. Later on that night she was with Curtis Collier and his wife and a Wendell Johnson in her apartment when the defendant came in. He was dressed in a white shirt which had blood on it and a pair of checkered trousers. He asked her if she knew Holland Lingard and when she answered in the affirmative, he stated that Holland Lingard had broken into their apartment and that he stabbed him. She further stated that the defendant seemed out of breath and appeared to have been running. She further testified that at the North Lang Avenue apartment the defendant had a small knife with a white handle and she was asked to identify that knife. He then departed and returned a short time later with Dixie Lee Davis. Dixie Lee Davis called the hospital to ascertain if a Holland Lingard was admitted.

Curtis Collier testified that the defendant appeared at his home around midnight and that the defendant appeared to be tired and sweaty and he had some blood on the sleeve of his shirt. Collier asked the defendant what was wrong and the defendant replied "You would be tired too, if you chased a guy five or six blocks and had to fight with him down the alley." Defendant further stated that as he was coming down the street he saw Lingard coming out of the house and then again return to the house. Defendant asked the victim what he was doing and the victim ran out. The victim then grabbed him and a fight ensued in the house. Thereafter, the victim ran out and down the street. Defendant further stated that he chased the victim for five or six blocks; that they fought on the ground and that somebody pulled a knife and that Lingard was stabbed a couple of times.

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

James W. Tyus testified that around midnight he went to the apartment at North Lang Avenue where he met the defendant. He stated that the defendant gave him a wallet and requested him to throw it away and that he agreed to do so but that he was apprehended by the police around 5:00 o'clock in the morning in the Oakland area of the City of Pittsburgh before he was able to dispose of the wallet. He stated that he did not remove anything from the wallet. The police, upon examining the wallet, found no money in the wallet.

Ronald B. Freeman, of the Homicide Squad of the City of Pittsburgh, investigated the circumstances of the killing. He saw the defendant on the night in question and was unable to observe any injuries upon him. The next day, armed with a search warrant, he removed a pair of trousers from the closet in the front room of the apartment of Antoinette Davenport. He also recovered a white shirt from a trash can in the rear of 1121 North Land Avenue. These were turned over to the Allegheny County Crime Laboratory for examination. The Crime Laboratory determined the blood grouping of the victim to be type A and also determined that the blood found on the white shirt was human blood type A.

The defense offered was twofold. Defendant stated that he was chasing an alleged burglar and, in the ensuing struggle to apprehend him, he did not know how the victim was stabbed and even if he did the stabbing, it was in self-defense. Defendant testified that on the night in question he was returning from the Homewood section of the city when he saw Holland Lingard in front of the apartment. He stated that he saw Lingard enter the apartment and

when he saw no lights, he entered and pushed against the door. He met some resistance and he concluded that the victim was behind it. Upon entering, the two met face to face and the victim stated to defendant that he knew Miss Davis. A struggle ensued and the victim tried to run out of the home but during the struggle the victim slipped out of his shirt and began to run. He followed the victim and at Murtland Street he sought the assistance of two people who were just getting into their car. He got into the vehicle and followed the victim to Fleury Way and caught up with him. He grabbed the victim and as he did so he saw an object in his hand. A struggle ensued and the victim became stabbed. He stated that he grabbed the victim from the rear by the trousers and pulled him towards himself when he saw some object in his hand. He became fearful for his life and tried to subdue the victim. While attempting to wrest some object from the victim's hand, he came up with a knife in his own hand. The next thing the defendant remembered was that the victim was bleeding. He stated that he did not know Lingard, although there was evidence to indicate that the two had met before.

Motion in Arrest of Judgment

In reviewing the sufficiency of the evidence to support the conviction, we must review the entire record in the light most favorable to the Commonwealth. *Commonwealth v. Johnson Appeal*, 445 Pa. 270, 284 A. 2d 780 (1971); *Commonwealth v. Lawrence*, 428 Pa. 188, 236 A. 2d 768 (1968). We must determine whether the fact finders could have reasonably found all of the elements of the crime established beyond a reasonable doubt. The evidence of the

Commonwealth clearly established that the last person with the victim was the defendant when he engaged in a struggle with him. The statements made by the accused to apparent friends indicated that he knew the victim was stabbed and he even made inquiries through his girl acquaintance at the hospital to ascertain whether the victim was hospitalized. It has been held that proof by eye witnesses or direct evidence of the identity or of the commission by the defendant of the crime charged is not necessary. A man may be convicted on circumstantial evidence alone and a criminal intent may be inferred by the jury from the facts and circumstances which are of such character as to prove the defendant guilty beyond a reasonable doubt. *Commonwealth v. Kravitz*, 400 Pa. 198, 208, 161 A. 2d 861 (1960); *Commonwealth v. Boden*, 399 Pa. 298, 159 A. 2d 894 (1960); *Commonwealth v. Burns*, 409 Pa. 619, 187 A. 2d 552 (1963); *Commonwealth v. Chester*, 410 Pa. 45, 188 A. 2d 323 (1963). When the circumstances as proved by the Commonwealth are considered, together with the admission made by the defendant immediately after the killing had occurred, we find that the verdict of the jury was amply supported and the motion in arrest of judgment must be denied.

Motion for a New Trial

The sole basis of the motion for a new trial is based on the contention that the court erred in permitting homicide detective Stephen Terezak to testify for the Commonwealth in rebuttal concerning certain oral admissions made by the defendant to him. At a suppression hearing previous to trial, the court suppressed the oral statements of the accused.

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

The oral statement was taken from the defendant when the police knew that John J. Cohen, Esquire, represented the defendant and especially after Mr. Cohen advised the homicide section of the Pittsburgh Police not to question the defendant without his presence. Notwithstanding this request, the police did interrogate the defendant without calling Mr. Cohen and took an oral statement from him which was reduced to writing but unsigned. Under such circumstances, there was little doubt that the proceedings were conducted in violation of the Fourth Amendment of the United States Constitution and in violation of *Miranda v. Arizona*, 384 U. S. 436, 86 Supreme Ct. 1602 (1966). The suppressed evidence was not referred to until the defendant, in taking the stand in his own behalf, testified that in chasing the victim on Murtland Avenue, he got into the rear seat of an automobile after requesting the occupants to help him in catching the victim and telling them that the victim had broken into his apartment. He also testified that after the stabbing, he took the knife with him to his apartment and gave it to a Miss Patterson with the request that she turn it over to Miss Davis.

In rebuttal, Officer Terezak testified that in questioning the defendant, the defendant told him that he left the knife behind and, when informed that the police found no knife at the scene, he stated that he took the knife but didn't remember to whom he gave it. He further stated to the officer that he chased the victim on foot and at no time was he ever in the car. Prior to this testimony being offered by the Commonwealth, the defense objected to the rebuttal offer on the ground that the defendant's statement was

suppressed and could not be used even for the purpose of impeachment. Defendant relied on the case of *Harris v. New York*, 401 U.S. 222, 91 Supreme Ct. 643 (1971).

In *Commonwealth v. Padgett, Appellant*, 428 Pa. 229, 237 A. 2d 209 (1968), the Supreme Court stated (p. 231):

> "A careful reading of *Escobedo* in light of the gloss placed upon that decision by *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602 (1966) dictates the conclusion that a statement procured either after failure to give an accused opportunity to consult with counsel or, as in this case, failure to warn an accused of his right to remain silent (under *Escobedo*), or in the absence of police attempts to advise the accused of his constitutional rights (under *Miranda*) cannot be employed at trial for any purpose. The *Miranda* opinion states quite clearly and without limitation that the prosecution '*may not use*'[2] statements obtained in violation of *Miranda's* procedural safeguards. The Supreme Court, throughout *Miranda*, stressed that both decisions were crafted from the same constitutional fabric[3] and were designed to effectuate the same purposes;[4] the conclusion is thus inescapable that a statement violative of *Escobedo* may not be used by the prosecution, even for purposes of impeachment. . . ."[1]

Whatever may have been the implications of this and other similar decisions surrounding illegally obtained evidence, the United States Supreme Court in the case of *Harris v. New York, supra* held specifically that statements inadmissible against the defendant in the Commonwealth's case in chief, because of the lack of procedural safeguards

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[1] The case was affirmed on the ground that the introduction of such statement was harmless beyond a reasonable doubt under *Chapman v. California*, 366 U. S. 18.

required by *Miranda*, may nevertheless be used for impeachment purposes, if its trustworthiness satisfies legal standards, to attack the credibility of defendant's trial testimony. The Court, speaking through Chief Justice Burger, said:

> "Some comments in the Miranda opinion can indeed be read as indicating a bar to use of an uncounselled statement for any purpose, but discussion of that issue was not at all necessary to the Court's holding and cannot be regarded as controlling. *Miranda* barred the prosecution from making its case with statements of an accused made while in custody prior to having or effectively waiving counsel. It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards."

In the instant proceedings there was no question raised as to the trustworthiness of the evidence to be offered. The Supreme Court, sweeping aside the assumed prohibition, concluded:

> "Every criminal defendant is privileged to testify in his own defense or to refuse to do so. But the privilege cannot be construed to include the right to commit perjury. See *United States v. Knox*, 396 U. S. 77 (1969); cf. *Dennis v. United States*, 384 U. S. 855 (1966). Having voluntarily taken the stand, the petitioner was under an obligation to speak truthfully and accurately, and the prosecution here did no more than utilize the traditional truth-testing devices of the adversary process. Had inconsistent statements been made by the accused to some third person, it could hardly be construed that the conflict could not be laid before the jury by way of cross-examination and impeachment.

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

> "The shield provided by *Miranda* cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by the use of his earlier conflicting statements."

We hold, therefore, that notwithstanding the statement quoted in *Padgett*, the most recent holding of *Harris v. New York, supra*, does permit impeachment by the use of a statement unconstitutionally obtained. Defendant attempts to draw a distinction between a signed statement and an oral statement reduced to writing but unsigned. Both are admissions except that in the signed statement, an accused, by his signature, adopts it as his own, whereas, in an oral statement he makes an admission to the police. We cannot, for the purpose of impeachment, see any difference.

A careful review of the evidence and the allegation of trial error leads us to the conclusion that both the motion in arrest of judgment and the motion for a new trial should be refused.

Appendix "A"—Opinion of the Court of Common Pleas of Allegheny County, Pennsylvania

ORDER OF COURT

IN THE

COURT OF COMMON PLEAS

OF ALLEGHENY COUNTY, PENNSYLVANIA

CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA,

VS.

VENOLIOUS LEE WOODS.

No. 6642 September Sessions, 1970
(Murder)

AND Now this 25th day of July, 1972, after argument and upon consideration of the record, IT IS ORDERED, ADJUDGED, AND DECREED that the motion in arrest of judgment and the motion for a new trial be and the same are hereby denied.

By the Court,
FIOK,
J.

APPENDIX "B"

Opinion of the Supreme Court of Pennsylvania

[313]

IN THE
SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

VENOLIOUS LEE WOODS,
Appellant.

No. 28 March Term, 1972

Appeal from the Judgment of Sentence in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. 6642 September Sessions, 1970.

OPINION

Justice MANDERINO Filed: December 4, 1973

The appellant, Venolious Lee Woods, was convicted in a jury trial of second-degree murder and received a sentence of eight to sixteen years imprisonment. Post-trial motions were denied and this appeal followed in which we must decide whether certain oral statements made by appellant to a police officer after his arrest were properly admitted in

rebuttal for impeachment purposes even though the statements were obtained in violation of *Miranda v. Arizona*, 384 U. S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and had been suppressed prior to trial.

The prosecution does not challenged the pretrial suppression order, but argues that it does not prohibit the use of the suppressed statements in rebuttal for impeachment purposes even though they could not be used as part of the prosecution's case in chief. The prosecution relies on *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643, 28 L. Ed. 2d 1 (1971), which the appellant contends is inapplicable to the facts of this case. We agree with the appellant that *Harris* is not applicable.*

Harris reaffirmed the inadmissibility of a defendant's suppressed statements in the prosecution's case in chief. *Harris*, however, permitted the prosecution to introduce

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* There has been unfavorable comment concerning *Harris*, a five to four decision, which permitted a limited use of suppressed statement for impeachment purposes. Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L. J. 1198 (1971); 10 DUQUESNE L. REV. 128 (1971); 45 TEMP. L.Q. 118 (1971); 38 U. PITT. L. REV. 135 (1971). Some jurisdictions have narrowly limited or have refused to follow the ruling. *See People v. Taylor*, 501 P.2d 918, 104 Cal. Rptr. 350 (Cal. 1972); *State v. Santiago*, 63 Hawaii 251, 263, 492 P.2d 657, 662 (1971). Prior to the *Harris* decision, we had held that statements of a defendant which were constitutionally inadmissible as part of the prosecution's case in chief could not be used at trial *for any purpose*. *Commonwealth v. Robinson*, 428 Pa. 450, 239 A.2d 308 (1963); *Commonwealth v. Padgett*, 428 Pa. 229, 237 A.2d 209 (1968). Since the *Harris* decision, we have not had occasion to consider the wisdom of allowing the use of a defendant's suppressed statements for limited impeachment purposes. We do not find it necessary to do so in this appeal since we agree with the appellant that the *Harris* rule does not apply to this case.

suppressed statements for the purpose of *contradicting alleged false statements made by the defendant while testifying. Harris* allowed the introduction of suppressed statements which were inconsistent with the defendant's trial testimony—testimony which the prosecution *disputed* during its case in chief. Defendant's trial testimony was helpful to the defendant and harmful to the prosecution. If the testimony of the prosecution's witnesses was truthful, the defendant was committing perjury.

The facts of this case differ significantly. Appellant's trial testimony, which the prosecution wanted to rebut, did not involve testimony which was disputed or contradicted in the prosecution's case in chief. The appellant's testimony agreed with the testimony of the prosecution's witnesses. The prosecution cannot claim it is harmed by testimony of the appellant which is not in dispute and which is corroborated by prosecution witnesses.

In this case, both the prosecution and the defense agreed that, following a chase in which the victim was running away from the appellant, the victim had been stabbed during a struggle in an alleyway. The disagreement centered around the motive for the crime. The prosecution claimed that robbery of the victim was the motive for the stabbing. The defense contended, however, that appellant was attempting to capture the victim who immediately before the chase, had attempted to burglarize the appellant's apartment located about seven blocks away from the scene of the stabbing. To sustain its version, which was based solely on circumstantial evidence, the prosecution contended (1) that during part of the chase, the appellant, while pursuing

the victim who was running on foot, was in an automobile with two other people and (2) that the appellant returned to his apartment with the knife used in the stabbing. In appellant's suppressed statements, which consisted of an oral conversation with a police officer, he at first denied both of the above facts but later in the conversation admitted the second fact. During his trial testimony, however, appellant *admitted both facts*. He testified that he was in an automobile with two other people during his pursuit of the victim and that he took the knife back to his apartment. Thus, as to these facts, there was no dispute between the testimony of the prosecution's witnesses and the trial testimony of the appellant. These are the only facts relevant to this appeal because they are the only facts which the prosecution wanted to contradict by using the suppressed statements. There was no reason to permit any rebuttal as to these facts because of the total agreement between the testimony of the prosecution and the appellant. In such a situation, any rule permitting the use of constitutionally infirm statements purporting to prevent perjury by the appellant can have no application. The prosecution in this case was not attempting to prevent alleged perjury but was only attempting to impeach the appellant. The prosecution should not be permitted to use constitutionally infirm statements to rebut appellant's trial testimony which completely agrees with the prosecution's testimony. We conclude that the appellant's suppressed oral statements should not have been admitted in rebuttal for impeachment purposes.

Moreover, we cannot conclude that the admission of the suppressed statements was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824,

17 L. Ed. 2d 795 (1967). The rebuttal testimony by the police officer, who obtained appellant's statements in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 St. Ct. 1602, 16 L. Ed. 2d 694 (1966), served to stigmatize the appellant as a liar by bringing appellant's inconsistent statements to the jury's attention. In addition, the police officer testified that during his questioning of the appellant, which was reduced to writing, he called the appellant a liar. In rebuttal the officer testified:

> "[The appellant] first told me that when he caught up with the man the man pulled a knife and during the struggle over the knife that he, the man, was stabbed. He left leaving the knife behind. *I then told him that he was a liar*, that we had found no knife at the scene of this homicide.
>
> He then told me that, *yes he did take the knife* . . .
>
> He then said that at no time on this night was he ever in a car. In fact, he had run the 7 or 8 blocks to the apartment, back, and that when he got home he was actually spitting out blood from being out of wind." (Emphasis added.)

We first note that the above alleged prior inconsistent statement as to the knife *was not inconsistent* with appellant's trial testimony. The police officer first quotes the appellant as saying he left the knife behind but quotes the appellant as admitting, almost immediately thereafter, that *he took the knife*. That is exactly what the appellant said in his trial testimony and exactly what the prosecution contended. There was absolutely no reason to allow the above testimony by the officer except perhaps to enable the officer to repeat, before the jury, his pretrial accusation that the appellant was a liar. If that was the prosecution's

motive, it was highly improper. Appellant's credibility was an issue for the jury to decide, not the police officer.

The credibility of the appellant was crucial in this case because the prosecution's contention that a robbery took place was based solely on circumstantial evidence. The jury's refusal to believe that the appellant was pursuing a burglar may well have been influenced by the introduction of appellant's suppressed statements and the officer's characterization of the appellant as a liar. We cannot, therefore, conclude that the inadmissible evidence was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 37 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Judgment reversed and a new trial ordered.

Mr. Justice Roberts joined the majority opinion and also filed a concurring opinion in which Mr. Justice O'Brien and Mr. Justice Nix join. Mr. Chief Justice Jones filed a dissenting opinion.

Appendix "B"—Opinion of the Supreme Court of Pennsylvania

CONCURRING OPINION

[J-313]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,
Appellee,

v.

VENOLIOUS LEE WOODS,
Appellant.

No. 26 March Term, 1972.

Appeal from the Judgment of Sentence in the Court of Common Pleas of Allegheny County, Pennsylvania, Criminal Division, at No. 6642 September Session, 1970.

ROBERTS, J. Filed: December 4, 1973.

I join in the opinion of the Court but desire to add that the present case is controlled by *Commonwealth v. Padgett*, 428 Pa. 229, 231, 237 A.2d 209, 210 (1968).[1] This Court in *Padgett* held that

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[1] *Commonwealth v. Horner*, ____ Pa. ____, 309 A.2d 552 (1973); *Commonwealth v. Robinson*, 428 Pa. 458, 239 A.2d 308 (1968).

> "a statement procured either after failure to give an accused opportunity to consult with counsel or, as in this case, failure to warn an accused of his right to remain silent (under *Escobedo* [*v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758 (1964)]), or in the absence of police attempts to advise the accused of his constitutional rights (under *Miranda* [*v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602 (1966)]), cannot be employed at trial for any purpose."

From this Court's unequivocal refusal to permit the prosecution to use an unconstitutionally obtained confession "for any purpose," it is evident that *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971),[2] cannot represent the law of this Commonwealth.

Harris-type use of constitutionally infirm confessions forces upon an accused a grisly Hobson's choice. Either an accused must forgo his right to testify, or he must risk the sure and devastating prejudice occasioned by the prosecution's use of the impermissibly obtained confession at the critical rebuttal stage.

Mr. Justice O'Brien and Mr. Justice Nix join in this opinion.

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[2] *Harris v. New York*, 401 U.S. 222, 91 S. Ct. 643 (1971), has been severely criticized. See Dershowitz & Ely, *Harris v. New York*: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority, 80 Yale L.J. 1198 (1971); The Supreme Court 1970 Term, 85 Harv. L. Rev. 40, 14-64 (1971).

Other jurisdictions have refused to follow *Harris*. *E.g.*, *People v. Taylor*, 30 Cal. App. 3d 117, 106 Cal. Rptr. 216 (1973); *State v. Santiago*, 53 Haw. 254, 263, 492 P.2d 657, 662 (1971).

DISSENTING OPINION

[313]

IN THE SUPREME COURT OF PENNSYLVANIA

WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

v.

VENOLIOUS LEE WOODS,

Appellant.

No. 26 March Term, 1972.

Appeal from Judgment of Sentence in Court of Common Pleas of Allegheny County, Criminal Division, at No. 6642, September Sessions, 1970.

JONES, C. J. Filed: December 4, 1973

In my view, the admission in rebuttal of the oral statements made by appellant to the police officer was not erroneous. Even if it were erroneous, such error was clearly harmless, non-prejudicial error which would not justify a new trial.